payment. Sze Chok Pang's further statement on oath that if he had been able to pay the expenses he would not have given the power of attorney to the defendant is significant and goes to show that the defendant was to be responsible for payment of all the expenses connected with the preliminary survey and examination of the permit area. It is also significant that after the bills were sent to the defendant, he did not at any time write back to the plaintiffs to say that he was not liable.

In the circumstances I find as a fact that the defendant appointed the plaintiffs as his consulting engineers and mining advisers at the meeting on 19th September, 1960 and that there was a concluded agreement between them which was confirmed in writing by the plaintiffs on the same day and never repudiated by the defendant.

As regards the amount claimed, the only items challenged are charges for travelling time and the engineer's expenses. All these charges were notified to the defendant and as I have stated above they were never questioned. I am satisfied that the amounts claimed by the plaintiffs are fair and reasonable.

In view of my finding that the defendant personally appointed the plaintiffs to carry out the prospecting work over the permit area and that he agreed to pay their charges, there will be judgment for the plaintiffs for $7,879.07 and taxed costs.

Judgment for the plaintiffs.

Solicitors:—*Bannon & Bailey; Donaldson & Burkinshaw.*

HITAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) March 11, 1963]

[Kuantan — Criminal Appeal No. 1 of 1963]

Criminal Procedure—Sentence—Inadequacy of sentence that can be imposed by Magistrate—Course to be taken by Magistrate who is also President of Sessions Court—Courts Ordinance, 1948, s. 85.

Criminal Evidence—Previous convictions—Record of, to be supplied to court—To be read and explained to accused.

If the prosecution feels that a sentence of one year's imprisonment is inadequate the prosecution should file the case in the Sessions Court and not in the Magistrate's Court.

In this case the accused pleaded guilty on a charge under section 454 of the Penal Code. The learned Magistrate purporting to exercise his powers under section 85 of the Courts Ordinance, 1948, took into consideration the accused's long list of previous convictions and sentenced him to 3 years' imprisonment and 12 strokes of the rattan plus one year police supervision. The accused appealed against the sentence.

Held: if in the opinion of the learned Magistrate his powers would be inadequate he should take the necessary steps to transfer the case to the Sessions Court. He cannot when sitting as such Magistrate assume the powers of a Sessions Court President.

Observations on procedure to be adopted by Magistrate who is also President of the Sessions Court in such cases.

Observations on need to supply Court with a copy of the list of previous convictions of the convicted person and duties of the Court and prosecuting officer in such cases.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Sheikh Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Hashim J. (delivering oral judgment): In this case the accused was charged under section 454 of the Penal Code and was tried in the Magistrate's Court at Kuantan. The accused pleaded guilty. Since the accused had a long list of convictions the learned Magistrate at the end of the case sentenced him to 3 years imprisonment and 12 strokes of rattan plus one year police supervision. The learned Magistrate quoted section 85 of the Courts Ordinance as his authority to exercise the powers of a President of the Sessions Court. The appeal is against sentence only.

The procedure in this case was wrong. The accused was tried in the Magistrate's Court. As I have said time and again, if the prosecution feels that the sentence of one year is inadequate the prosecution should file the case in the Sessions Court and not in the Magistrate's Court. The accused had 13 previous convictions and if the prosecution felt that he should get more than one year the man should have been charged in the Sessions Court. That is the fault of the prosecution. When the learned Magistrate found that one year was inadequate he should have transferred the case to the Sessions Court and then heard it as a President of the Sessions Court. Section 85 of the Courts Ordinance reads as follows:—

"85. Subject to the limitations contained in this Ordinance a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed three years' imprisonment of either description or which are punishable with fine only and offences under Sections .....of Penal Code.

Provided that if a First Class Magistrate is of the opinion that in the circumstances of the case, if a conviction should result, the powers of punishment which he possesses would be inadequate, he shall take the necessary steps to transfer the case for trial to a Sessions Court."

If in the opinion of the Magistrate his powers would be inadequate he should take the necessary

steps to transfer the case to the Sessions Court. What the learned Magistrate/President should have done in this case was not to accept his plea of guilty but to transfer the case to the Sessions Court. He should have adjourned the Court for a few minutes, registered the case as a Sessions Court case and charged him in the Sessions Court. One cannot assume a dual personality on the Bench.

The appeal is dismissed. The sentence of 3 years' imprisonment to be followed by 12 months police supervision is confirmed.

There is another thing which I would suggest to the learned Deputy Public Prosecutor. He might instruct the prosecuting officers to supply to the Court a copy of the previous convictions of the convicted person and it is the duty of both the Court as well as the prosecuting officer to see that each and every item in the list of previous convictions be read and explained to the accused and it is for the accused to admit or deny each and every item. Here there is no record in this file to show that the accused has admitted all or any of his previous convictions and unless and until it is done he is supposed to have no previous convictions.

Now all the previous convictions appear to be for theft, criminal breach of trust, loitering etc. Nowhere in this long list of previous convictions is a crime of violence.

Whipping should not be imposed unless the crime committed is one of violence. The sentence of 12 strokes with the rattan is set aside.

Appeal dismissed.

Sentence varied.

PUBLIC PROSECUTOR v. HO TAN SZE

[A.Cr.J. (Ismail Khan J.) March 16, 1963]

[Seremban — Criminal Appeal No. 7 of 1961]

Moneylenders Ordinance, 1951, ss.3 and 8(b)—Single moneylending transaction—No licence—Reversal of onus.

Pawnbrokers Enactment (Cap. 85), s. 25—Alternative charge under—Isolated moneylending transaction—Whether pawnbroker is a moneylender—Onus.

The respondent had advanced a sum of $350 at a remunerative rate of interest and had taken three gold brooches as security. He was charged under section 8(b) of the Moneylenders Ordinance and, alternatively, under section 3(i) of the Pawnbrokers Enactment but was acquitted and discharged without his defence being called. The Public Prosecutor appealed on the ground that there was evidence, which, if unrebutted would warrant a conviction in respect of the first charge.

Held: (1) when a single moneylending transaction is proved against a party, then the onus of proving that he is not carrying on business as a moneylender passes to him;

(2) in this case there was evidence that the respondent had no moneylender's licence and that he had lent money at a remunerative rate of interest, therefore, all the conditions necessary to attract the operation of the presumption in section 3 of the Ordinance were present and the defence should have been called.

Cases referred to:—

(1) *Newton* v. *Pyke* (1908) 25 T.L.R. 127.

(2) *Kirkwood* v. *Gadd* [1910] A.C. 422, 431.

(3) *Newman* v. *Oughton* [1911] 1 K.B. 792, 795, 796.

(4) *Sadhu Singh* v. *Sellathurai* [1955] M.L.J. 117, 119.

MAGISTRATE'S CRIMINAL APPEAL.

Mohd. Salleh bin Abas (Deputy Public Prosecutor) for the appellant.

Edgar Joseph, Jr. for the respondent.

Ismail Khan J.: The respondent was charged as follows:—

"That you on 11.11.59 at about 4.15 p.m. at No. 65, Paul Street, Seremban, did carry on business as a moneylender without holding a licence and that you thereby committed an offence punishable under section 8(b) of the Moneylenders Ordinance 42 of 1951."

In the alternative he was charged as follows:—

"That you on 11th November, 1959 at about 4.15 p.m. at No. 65, Paul Street, Seremban, without you having been granted a licence under the Pawnbrokers Enactment (Cap. 85) did act as a pawnbroker, and that you thereby committed an offence under section 3(i) and punishable under section 25 of the aforesaid Enactment (Cap. 85)."

The President acquitted and discharged the respondent without calling for the defence as he held that the prosecution had not made out a case beyond reasonable doubt either in respect of the main charge or the one in the alternative. Against this acquittal the learned Public Prosecutor has appealed on the ground that there was evidence which, if unrebutted, would warrant a conviction in respect of the first charge.

According to the prosecution, the respondent was the manager of Chop Heng Sheng which had a licence to operate a pawnbroking business at No. 13, Main Road, Mantin. Apart from the evidence of P.W.5, there was ample evidence, particularly the evidence of P.W.4 and the pawn ticket (P2), that on 11th November, 1959, the respondent had advanced a sum of $350 to P.W.5 at a remunerative rate of interest and had taken as security 3 gold brooches.

Section 2 of the Pawnbrokers Enactment reads as follows:—

"In this Enactment the word 'pawnbroker' shall mean and include any person who purchases or receives any article and pays money for or advances money upon the same to an amount not exceeding two hundred and fifty dollars with or under any undertaking, agreement, or